

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

4 v.

16 CR 212 (LAK)

5 MARK CLARKE,

Plea

6 Defendant.

7  
8 New York, N.Y.  
9 January 3, 2018  
12:10 p.m.

10 Before:

11 HON. ROBERT W. LEHRBURGER

12 District Judge

13  
14 APPEARANCES

15  
16 JOON H. KIM  
17 Acting United States Attorney for the  
18 Southern District of New York  
19 RACHEL MAIMIN  
20 Assistant United States Attorney

21 DEVERAUX CANNICK  
22 Attorney for Defendant

23 Interpreter (Spanish):

24 NICHOLAS LUTTINGER  
25

1 (Case called)

2 MS. MAIMIN: Good afternoon, your Honor. Rachel  
3 Maimin for the government.

4 MR. CANNICK: Good afternoon, your Honor. Deveraux  
5 Cannick for Mark Clarke.

6 THE COURT: Good afternoon. You may be seated. Sorry  
7 for the holding pattern there for a few minutes.

8 Good morning, Mr. Clarke.

9 THE DEFENDANT: Good morning, sir.

10 THE COURT: I'm Magistrate Judge Lehrburger. I  
11 understand we are here because you wish to enter a plea with  
12 respect to charges against you. In this case you are going to  
13 be pleading, I understand, to a lesser included offense. How  
14 do you intend to plead to that lesser included offense?

15 THE DEFENDANT: Guilty.

16 THE COURT: We are speaking in English. Are you able  
17 to understand and hear what I'm saying?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: I'll ask the deputy to swear you in so  
20 that you can give truthful answers and I can make sure you're  
21 giving truthful answers to the questions I'm going to ask you  
22 today.

23 (Defendant sworn)

24 THE COURT: I have before me a Consent to Proceed  
25 Before a United States Magistrate Judge on a Felony Plea

1 Allocation that appears to have your signature. Did you sign  
2 it?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: This form says that you know you have the  
5 right to have your plea taken by a United States magistrate  
6 judge rather than a district judge. As a magistrate judge, I  
7 have the authority to take your plea with your consent, and you  
8 will be entitled to all of the same rights and protections you  
9 would otherwise have if you were giving your plea before a  
10 district judge. But you will be sentenced by the district  
11 judge, not by me. Do you understand what I have just  
12 explained?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Before you signed consent form, did your  
15 lawyer explain it to you?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You do wish to proceed with your plea  
18 before a magistrate judge, is that correct?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: I will accept the consent.

21 The purpose of this proceeding today is to make sure  
22 you understand your right to decide whether you are pleading  
23 guilty of your own free will and to make sure you are pleading  
24 guilty because you are guilty and not for some other reason.  
25 Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: I am now going to ask you some questions.  
3 These are meant to determine that you are indeed competent and  
4 able to give a plea today of your own free will. It is very  
5 important that you understand the questions and answer truth-  
6 fully. If you don't understand anything, just let me know or  
7 speak to your attorney.

8 What is your full name?

9 THE DEFENDANT: Excuse me, sir?

10 THE COURT: What is your full name.

11 THE DEFENDANT: Mark Clarke, Mark Bradley Clarke.

12 THE COURT: How old are you?

13 THE DEFENDANT: 22.

14 THE COURT: Can you read and write in English?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: How far did you go in school?

17 THE DEFENDANT: Eleventh.

18 THE COURT: Eleventh grade?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Are you currently or have you recently  
21 been under the care of a doctor or a psychiatrist or a  
22 psychologist?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: What for and when?

25 THE DEFENDANT: For schizophrenia. I went to the

1 Butner facility, went for counseling and psychiatrist at the  
2 Butner facility.

3 MR. CANNICK: Your Honor, to make sure the Court  
4 understands what is happening, early on in these proceedings  
5 Mr. Clarke experienced a mental episode that caused him to be  
6 evaluated and subsequently treated at Butner, where he was at  
7 least for four or five months. He was restored after he had  
8 been at Butner. He has now been back here and functioning  
9 normally for the last six to eight months. He we have had no  
10 problems understanding each other during this proceeding.  
11 About four months, your Honor.

12 THE COURT: About four months since he's been back?

13 MR. CANNICK: Yes, since he's been back from Butner.

14 THE COURT: Thank you for explaining that.

15 Do you have any condition that affects your ability to  
16 see or to hear?

17 THE DEFENDANT: No, sir.

18 THE COURT: Do you have any condition right now that  
19 affects your ability to think or understand or make decisions  
20 for yourself?

21 THE DEFENDANT: No.

22 THE COURT: Have you ever been hospitalized for  
23 alcoholism or addiction to narcotics?

24 THE DEFENDANT: No.

25 THE COURT: As you sit here today, are you under the

1 influence of any mind-altering drug or alcohol?

2 THE DEFENDANT: No, sir.

3 THE COURT: How do you feel today?

4 THE DEFENDANT: I feel good, sir.

5 THE COURT: Do you feel like you are in your clear  
6 mind?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand what is happening here?

9 THE DEFENDANT: Yes, sir.

10 MS. MAIMIN: Your Honor, may I have one moment with  
11 counsel, please?

12 THE COURT: Sure.

13 (Counsel conferred).

14 MR. CANNICK: Nothing further.

15 MS. MAIMIN: Thank you, your Honor.

16 THE COURT: The charges against you are set forth in a  
17 superseding indictment. Have you seen a copy of that super-  
18 seding indictment?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Did you read it?

21 THE DEFENDANT: Yes. It said --

22 THE COURT: I'm just asking if you read it.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand what it says?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Have you had enough time to talk with your  
2 attorney about how you wish to plead and what the consequences  
3 are?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Are you satisfied with your attorney's  
6 representation of you?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Does either counsel have any objections to  
9 or concerns about the defendant's competency to mind at this  
10 time?

11 MS. MAIMIN: No, your Honor, particularly in light of  
12 the evaluation by the professionals of the BOP that the  
13 defendant has been rendered competent.

14 MR. CANNICK: Your Honor, adding to that, as I stated  
15 earlier, I have had numerous conferences with Mr. Clarke since  
16 he has been restored to competency, and he has had no problems  
17 whatsoever. The medications that he was prescribed he is no  
18 longer on the medication. He has been fully restored.

19 THE COURT: That is good to hear.

20 Mr. Clarke, I am now going to explain certain rights  
21 that you will be giving up by pleading guilty. Again, please  
22 listen carefully. If you don't understand, let me or your  
23 attorney know.

24 Under the Constitution and the laws of the United  
25 States, you have a right to plead not guilty to the charges

1 against you. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: If you plead not guilty, you would be  
4 entitled under the Constitution to a speedy and public trial by  
5 a jury of those charges. At that trial you would be presumed  
6 innocent and the government would be required to prove your  
7 guilt beyond a reasonable doubt. You could not be convicted  
8 unless a jury of 12 persons agreed unanimously that you are  
9 guilty beyond a reasonable doubt. Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: If you decided to go to trial, at that  
12 trial and at every stage of those proceedings in your case you  
13 would have the right to be represented by an attorney. If you  
14 could not afford one, the government would pay to have one  
15 represent you. If you retained an attorney on your own behalf  
16 using funds but you ran out of those funds, the government  
17 would appoint an attorney for you. So you would have an  
18 attorney all the way through trial and not just for a guilty  
19 plea. I want to make sure that you understand your decision to  
20 plead guilty should not depend on whether you can afford to  
21 hire an attorney. Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: During a trial the witnesses for the  
24 prosecution would have to come to court and testify in your  
25 presence, where you could see and hear them, and your lawyer



1 could cross-examine those witnesses. If you wanted, your  
2 lawyer could offer evidence on your behalf. And you would be  
3 able to use the court's power to make witnesses come to court  
4 to testify in your defense even if they didn't want to. Do you  
5 understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: At a trial you would have the right to  
8 testify in your own defense if you wanted, but you would also  
9 have the right not to testify. If you chose **not** to testify,  
10 that could not be used against you in any way. In other words,  
11 no inference or suggestion of guilt could be drawn or permitted  
12 from the fact that you did not testify. Do you understand  
13 that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: If you were convicted at trial, you would  
16 have the right to appeal that verdict to a higher court. Do  
17 you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: As I said before, you have the right to  
20 plead not guilty and even right now you have that right to  
21 change your mind or to give a different plea. Do you  
22 understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: But if you do plead guilty and if I accept  
25 your plea, you will give up your right to a trial and all the

other rights I have described. If you plead guilty, there will be no trial, and all that will remain is to impose a sentence. You and the government will have a chance to make arguments about what sentence you will get, but there will not be any further trial to determine your guilt or innocence with regard to the charges. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that the decision as to the appropriate sentence in your case will be entirely up to the sentencing judge, and that judge will be limited only by what the law requires? This means that even if you are surprised or disappointed by your sentence, you will be bound by your guilty plea nevertheless. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Finally, if you do plead guilty, you are also giving up the right not to incriminate yourself, and I'll ask you questions about what you did in order to satisfy myself that you are actually guilty. By pleading guilty, you will be admitting your factual as well as your legal guilt. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I now want to review the charges against you, the lesser included offense, and the maximum penalties that you will face in pleading guilty to that lesser included offense.

1 Count Two of the superseding indictment charges you  
2 with participating from at least in or about 2007 up to and  
3 including in or about 2016 in a conspiracy to distribute 280  
4 grams and more of mixtures and substances containing a  
5 detectable amount of cocaine base in violation of Title 21,  
6 United States Code, section 841(b)(1)(A), and 100 kilograms and  
7 more of mixtures and substances containing a detectable amount  
8 of marijuana in violation of Title 21, United States Code,  
9 section 841(b)(1)(B), in violation of Title 21 U.S.C. section  
10 846.

11 Do you understand that those are the charges under the  
12 second charge of the indictment, of the superseding indictment?  
13 Not that you are pleading to, but just that that was Count Two  
14 as set forth.

15 THE DEFENDANT: Yes, sir.

16 THE COURT: I have before me a letter agreement  
17 indicating what you intend to plead guilty to. Under the terms  
18 of that agreement, the government will accept a guilty plea to  
19 a lesser included offense of your participation in a conspiracy  
20 to distribute more than 50 kilograms of marijuana in violation  
21 of Title 21 U.S.C. section 841(b)(1)(C) from at least in or  
22 about 2007 up to and including about 2016. Do you understand  
23 that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Now I'm going to describe the maximum

penalties you can receive for pleading guilty to that lesser included offense. The maximum penalties are as follows:

A maximum sentence of 20 years' imprisonment;

A maximum term of lifetime supervised release;

A mandatory minimum term of 3 years' supervised release;

A maximum fine of the greater of \$1 million or, pursuant to 18 U.S.C. section 3571, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to a person other than the defendant, that is you, as a result of the offense; and

A mandatory \$100 special assessment.

Do you understand those maximum penalties?

THE DEFENDANT: Yes, sir.

THE COURT: In addition, you will be subject to making restitution in an amount ordered by the Court in accordance with the law. Do you understand that?

MR. CANNICK: May I have one second, please?

THE COURT: Yes.

(The defendant and counsel conferred.)

MR. CANNICK: We are ready to proceed, your Honor.

THE COURT: I would ask the Assistant United States Attorney if you could state the elements of the charge to which the defendant is pleading.

MS. MAIMIN: Yes, your Honor. If this case proceeded

to trial, the government would have to prove the following two elements beyond a reasonable doubt:

First, that the charged conspiracy existed, that is, that there was a conspiracy or agreement between two or more people to distribute or possess with intent to distribute at least 50 kilograms of marijuana; and

Second, that the defendant knowingly and intentionally joined that conspiracy.

The government would also have to prove venue is proper in this district by a preponderance of the evidence

THE COURT: Thank you.

I also want you to understand that if you are not a citizen of the United States, your guilty plea may also have adverse consequences for your ability to remain in the United States, including removal, deportation, denial of citizenship, and denial of admission to the United States in the future. If that does happen, you will still be bound by your guilty plea and will not be able to withdraw it regardless of any advice provided to you by counsel or others regarding the immigration consequences of your plea. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Overall, do you understand the lesser included offense to which you are pleading and the consequences of pleading guilty?

THE DEFENDANT: Yes, sir.

1 THE COURT: Now I'm going to ask you some questions to  
2 make sure that this plea is given of your own free will and  
3 entirely voluntarily. Has anyone threatened, forced, or  
4 coerced you in any way, either directly or indirectly, to plead  
5 guilty?

6 THE DEFENDANT: No, sir.

7 THE COURT: As I mentioned, there is a plea agreement  
8 set forth in a letter that I have before me. Did you sign this  
9 plea agreement on page 5?

10 THE DEFENDANT: Yes, I signed.

11 THE COURT: Did you read the agreement before you  
12 signed it?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Did you understand its terms?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Did you discuss the agreement with your  
17 attorney before you signed it?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Did he explain its terms and conditions to  
20 you?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Apart from what is contained in the  
23 letter, in other words, other than what is set forth in this  
24 letter, have any promises been made to you in order to get you  
25 to plead guilty?

1 THE DEFENDANT: No, sir.

2 THE COURT: The letter agreement also says that you  
3 and the government have agreed about the range, which is the  
4 appropriate calculation of your sentence under a part of our  
5 law known as the sentencing guidelines, and that the  
6 appropriate guideline sentencing range for you is 18 to 24  
7 months' imprisonment. Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Under this agreement neither you nor the  
10 government is allowed to argue to the sentencing judge for a  
11 calculation that is different from that one. However, the  
12 sentencing judge isn't bound, as I said before, by the  
13 calculation in the letter, and he or she will be free to make  
14 his or her own calculation, including one that is different  
15 from the sentencing range that is set forth here. Do you  
16 understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand that the sentencing  
19 range is just one of many factors the judge will consider in  
20 determining your sentence, and the judge has discretion to give  
21 a sentence above or below the range up to the maximum sentence  
22 I told you about earlier? Do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand that as long as the  
25 sentencing judge sentences you to a prison term of no longer

1 than 24 months -- that was the upper part of the range -- you  
2 are giving up your right to challenge your sentence, whether by  
3 direct appeal, writ of habeas corpus, or otherwise? Do you  
4 understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Also, do you understand that the plea  
7 agreement says that you will be subject to a range of a fine in  
8 the amount of \$7,500, to \$75,000? Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand that by pleading to  
11 this, you will be giving up your right to appeal that fine or  
12 any lawful sentence of supervised release? Do you understand  
13 that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And that you will also be giving up your  
16 right to appeal any imposition of restitution? Do you  
17 understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Is there any other provision in the plea  
20 agreement that counsel wishes me to review with Mr. Clarke?

21 MS. MAIMIN: Not from the plea agreement, your Honor.

22 MR. CANNICK: No, your Honor.

23 THE COURT: Do you understand, Mr. Clarke, that under  
24 the terms of the agreement, even if you later learn that the  
25 government withheld from you evidence or information that would



1 have been helpful to you in defending yourself at trial, you  
2 will not be able to complain about that or withdraw your guilty  
3 plea?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: In addition to considering what is set  
6 forth in the plea agreement as well as factors and other  
7 considerations under the law, the sentencing judge will also  
8 consider a pre-sentence report prepared by the probation  
9 department in advance of your sentencing. Before you are  
10 sentenced, you and the government will have an opportunity to  
11 challenge the facts reported by the probation officer. Do you  
12 understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Now that you have been advised of the  
15 charges against you, the lesser included offense to which you  
16 intend to plead, the possible penalties you face, and the  
17 rights you are giving up, is it still your intention to plead  
18 guilty to the lesser included offense set forth in the plea  
19 agreement?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Is your plea voluntary and made of your  
22 own free will?

23 THE DEFENDANT: Made of my own free will.

24 THE COURT: Mr. Clarke, with respect to the lesser  
25 included offense set forth in the plea agreement, how do you

plead, guilty or not guilty?

THE DEFENDANT: Guilty.

MS. MAIMIN: Your Honor, may I interrupt?

THE COURT: Yes.

MS. MAIMIN: I apologize if I missed it. There were a few points I was hoping the court could allocute the defendant on: First, that he is satisfied with his representation of his attorney; second, that he is aware of any effect of any violation of supervised release; that if he lies to your Honor, because he is under oath, he would be subject to penalties of perjury; and that he admits to the forfeiture allegation in the indictment.

THE COURT: What was the last part?

MS. MAIMIN: Admits to the forfeiture allegation in the indictment.

THE COURT: I believe I did ask him if he was satisfied with counsel.

MS. MAIMIN: I might have missed that, Judge. I'm sorry.

THE COURT: I will follow up on the others.

Do you understand, Mr. Clarke, that among the admissions you are making in pleading guilty is an admission to forfeiture?

THE DEFENDANT: Excuse me?

THE COURT: Do you understand that one of the things

1 to which you are admitting and agreeing is forfeiture of  
2 instruments, goods, property, money, etc., used in connection  
3 with or to be used in connection with the offense to which you  
4 are pleading?

5 (The defendant and counsel conferred.)

6 THE DEFENDANT: Yes.

7 THE COURT: Do you understand that if you violate the  
8 terms of your supervised release following imprisonment, that  
9 could result in additional penalties to which you would be  
10 subject?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Is there anything else, counsel? Was  
13 there one other item?

14 MS. MAIMIN: Just that he could be subject to the  
15 penalty of perjury if he lied to the Court during this  
16 proceeding; and to confirm if he knows if he violated  
17 supervised release, he could be sentenced to additional prison  
18 time without credit for any time previously served.

19 THE COURT: To follow up on the point about violating  
20 terms of supervised release, do you understand that if you do  
21 violate those terms, you could be subject to additional prison  
22 time without any credit for time served?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand that having taken an  
25 oath at the outset of this proceeding, in answering all my

1 questions you are subject to a penalty of perjury if you have  
2 not told the truth?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Are you satisfied?

5 MS. MAIMIN: Yes. Thank you, your Honor.

6 THE COURT: What is the basis for venue here in the  
7 Southern District?

8 MS. MAIMIN: The marijuana conspiracy took place in  
9 the Bronx, New York.

10 THE COURT: Mr. Clarke, on the basis of your responses  
11 to my questions and my observations of your demeanor, I find  
12 that you are competent to enter an informed guilty plea and  
13 that there is a factual basis for it. I'm satisfied that you  
14 understand your rights, that you are aware of the consequences  
15 of your plea, including the sentence that may be imposed, that  
16 you are voluntarily pleading guilty, and that you have admitted  
17 that you are guilty as charged in the lesser included offense  
18 set forth in the plea agreement. For these reasons, I will  
19 recommend that the district judge accept your plea.

20 I assume the government will order a copy of the  
21 transcript and submit it to the judge together with any  
22 additional paperwork.

23 MS. MAIMIN: Yes, your Honor. But the defendant  
24 hasn't allocuted yet.

25 THE COURT: My apologies. Counsel is absolutely

right. Mr. Clarke, before I can accept your plea, I actually need you to tell me in your own words what it is you did that makes you guilty. Will you please do so.

THE DEFENDANT: I agreed to sell marijuana, at least 50 kilos of marijuana, and I'm sorry for the hurt I put on other people's families by doing so. And that this happened in the Bronx, New York between 2007 and '16. I agree that I took part in selling marijuana, yes, sir.

THE COURT: Did you know what you were doing was wrong at the time you were doing it?

THE DEFENDANT: Excuse me, sir?

THE COURT: Did you know what you were doing was against the law and wrong at the time you were doing it?

THE DEFENDANT: I knew what I was doing, yes, sir. I was young and dumb in those days.

THE COURT: I just want to know did you know what you were doing was against the law?

THE DEFENDANT: Yes, sir.

THE COURT: Is the government satisfied?

MS. MAIMIN: Yes.

THE COURT: Thank you. Having made that addendum and follow-up, I do accept the plea.

Will the government order a copy of the transcript and submit it to the judge?

MS. MAIMIN: We will.

1 THE COURT: Has the district judge set a sentencing  
2 date?

3 MS. MAIMIN: He has, your Honor. April 11, 2018, at 4  
4 p.m. before Judge Kaplan.

5 MR. CANNICK: Your Honor, given the guideline range  
6 here and the fact that my client has been incarcerated for 20  
7 months, I'm asking the Court to respectfully set an accelerated  
8 pre-sentence report as well as sentencing date.

9 THE COURT: Does the government have any view on this?

10 MS. MAIMIN: Your Honor, I think this can be  
11 accomplished through Judge Kaplan's deputy, and I will contact  
12 him promptly after today's proceeding.

13 THE COURT: Is that acceptable to the defendant?

14 MR. CANNICK: That's fine, your Honor.

15 THE COURT: I will direct that a pre-sentence report  
16 be prepared. Can the government deliver the case summary for  
17 purposes of the pre-sentence report within the next 14 days?

18 MS. MAIMIN: Yes.

19 THE COURT: Can defense counsel be available with his  
20 client for the probation department within 14 days?

21 MR. CANNICK: In light of my application, I'll be  
22 ready tomorrow.

23 THE COURT: What is the current condition of release,  
24 if any, or is the defendant being detained?

25 MR. CANNICK: He is currently detained, and we need no

modification of that, your Honor.

THE COURT: Detention will be continued.

Given what has been explained in terms of the defendant's medical history, is there any medical attention with which he is concerned or requires any assistance at this time?

MR. CANNICK: No, your Honor.

THE COURT: We are adjourned. Mr. Clarke, good luck to you. I wish you well.

THE DEFENDANT: Thank you, sir.

(Adjourned)